LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 10 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 424

I. A. WATSON, JR., T. W. NORTHCROSS, SR., W. D. SPEIGHT, JR., A. E. HORNE, SR., MELVIN MALUNDA, JOHNNY GHOLSTON, HAROLD GHOLSTON, ALFRED HAYNES, JR., JOHN ROGERS, THOMAS PUGH and CURTIS KING, on behalf of themselves and others similarly situated,

Petitioners,

—v.—

CITY OF MEMPHIS, a public body corporate, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JACK GREENBERG
CONSTANCE BAKER MOTLEY
DERRICK BELL
NORMAN AMAKER
10 Columbus Circle
New York 19, New York

A. W. WILLIS, JR.
588 Vance Avenue
Memphis, Tennessee

Attorneys for Petitioners

B. L. HOOKS
C. O. HORTON
B. F. JONES
H. T. LOCKARD
R. B. SUGARMON, JR.
Memphis, Tennessee

Of Counsel

INDEX

	PAGE
Citation to Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Granting the Writ	7
The Decision Below Conflicts With Prior Decisions of This Court Declaring Constitutional Rights to Be Personal and Present; the Delay Contemplated by the *School Segregation Cases* Is Not Applicable Here.	
Conclusion	10
Appendix	11
Opinion of United States Court of Appeals for the Sixth Circuit	11

Table of Cases:

Brown v. Board of Education, 347 U. S. 483	9
Brown v. Board of Education, 349 U. S. 294	8
Buchanan v. Warley, 245 U. S. 60	9

PAGE

Cooper v. Aaron, 358 U. S. 1 9
Cummings v. City of Charleston, 288 F. 2d 817 (4th Cir. 1961) 9

Detroit Housing Commission v. Lewis, 226 F. 2d 180 (1955) 9

Florida ex rel. Hawkins v. Board of Control, 350 U. S. 413 (1956) 8

McLaurin v. Oklahoma State Regents, 339 U. S. 637 7

Pennsylvania v. Board of City Trusts of Philadelphia, 353 U. S. 230 (1957) 10

Sipuel v. Board of Regents of University of Oklahoma, 332 U. S. 631 7
Sweatt v. Painter, 339 U. S. 629 7

IN THE

Supreme Court of the United States

October T. 1962

No. .....

I. A. WATSON, JR., T. W. NORTHCROSS, SR., W. D. SPEIGHT, JR., A. E. HORNE, SR., MELVIN MALUNDA, JOHNNY GHOLSTON, HAROLD GHOLSTON, ALFRED HAYNES, JR., JOHN ROGERS, THOMAS PUGH and CURTIS KING, on behalf of themselves and others similarly situated,

Petitioners,

—v.—

CITY OF MEMPHIS, a public body corporate, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners in the above entitled cause pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on June 12, 1962.

Citation to Opinions Below

The District Court did not render an opinion. Its judgment was filed on June 20, 1961 and appears in the certified record at p. 118a, *et seq.* Its formal Findings of Fact and Conclusions of Law were filed on June 27, 1961 and appear

in the record at p. 105a.* The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 303 F. 2d 863. It is appended hereto at p. 11.

Jurisdiction

The opinion and judgment of the Court of Appeals was rendered on June 12, 1962 (App. 11). The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1254(1).

Question Presented

Whether the courts below erred in holding that principles stated in *Brown* v. *Board of Education*, 349 U. S. 294, which allow delay in desegregating public schools, apply to this case which involves desegregating public recreational facilities.

Constitutional Provision Involved

This case involves Section One of the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

On May 13, 1960, petitioners for themselves and other Negro citizens residing in Memphis, filed suit in the United States District Court for the Western District of Tennessee, Western Division, for a declaratory judgment and permanent injunction restraining the Memphis Park Commission and others from operating public recreational facilities

* Petitioners in addition to the certified record, have filed nine copies of the record as printed for the use of the court below pursuant to Rule 21(4) of the Rules of this Court.

on a racially segregated basis. Jurisdiction was based on 28 U. S. C. §1343(c), 28 U. S. C. §§2201, 2202 and 42 U. S. C. §§1981, 1983.

In substance they complained that defendants maintained some facilities exclusively for white and others exclusively for Negro citizens. Petitioners further alleged that they and other members of the class attempted to use facilities restricted to white persons and were barred or arrested on account of race or color contrary to the equal protection clause of the Fourteenth Amendment and 42 U. S. C. §1981 (R. 2a-9a).

July 1, 1960 defendants answered (R. 10a-14a). The answer did not deny operating segregated recreational facilities. Rather, defendants asserted in justification: that facilities for Negroes were equal to those for whites; that Memphis provided a system of neighborhood parks designated for whites or Negroes according to the racial makeup of the area and that "[i]n other than residential areas, the parks are used generally by all the citizens of Memphis" (R. 11a);[1] that certain lands upon which recreational facilities were situated were acquired under restrictive conditions relating to use solely by white persons; that "problems" of the nature of "riots, violence, and disharmony" (R. 12a) would be the likely consequence of immediate court ordered desegregation of all facilities and, therefore, these defendants in discharge of their duties as public officers and in exercise of their police power felt it necessary to maintain the system as constituted; that a loss of revenue would

[1] Evidence, however, showed that the neighborhood policy is not uniformly adhered to in that in some previously white but now predominantly Negro neighborhoods, the parks or playgrounds were still maintained exclusively for whites (R. 89a-90a). Moreover, at least one city-wide facility, Crump Stadium, was still operated on a segregated basis (R. 91a).

result from a loss of attendance caused by fear of disorders; that the expense of operating the parks would be prohibitive because of the extra police protection required, since "the incidence of violence, vandalism and disorders among visitors to the parks of the City of Memphis is greatly increased in those parks frequented by Negro citizens of the City of Memphis" (R. 14a).

The cause came on for trial on June 14-15, 1961. The facts were established substantially as plaintiffs alleged: The City of Memphis, through its Park Commission, operated and maintained a public recreational system of 131 parks and facilities on a racially segregated basis. Of these 131, 108 were "developed," 25 were "undeveloped" (i.e., on raw land); 25 of the developed facilities were restricted to use by whites (R. 44a, 46a, 77a, 80a). Forty "neighborhood" playgrounds were restricted to white persons, 21 to Negroes, 8 community centers were restricted to whites and 4 to Negroes, and there were 5 white and 2 Negro golf courses and 2 "city-wide" white stadiums (R. 73a-74a, 80a, 81a).[2] Negroes who attempted to use "white" facilities were denied admission and in some cases were arrested if they refused to leave when ordered (R. 22a, 88a-89a).

The Park Commission's policy was to open up parks from time to time for all citizens (R. 46a). It had recently removed racial restrictions at three "city-wide" facilities as part of its gradual desegregation plan (R. 47a)[3] and other facilities throughout the city were scheduled to be

[2] In addition, the Park Commission operates 56 playgrounds and facilities on property owned by various churches; 30 designated as "white," the rest restricted to Negroes (R. 80a-81a).

[3] At at least one of these facilities, however, racial bars had not been completely removed; the toilet facilities at Overton Park Zoo were still segregated at the time of trial (R. 96a). Testimony also revealed that at one of the older "integrated" facilities, Court Square, there were toilets for whites only (R. 86a).

desegregated on a gradual basis in accordance with that plan (R. 47a-50a). Commission officials and the local chief of police testified that, in their opinion, any desegregation in public recreational facilities taking place in any manner other than that proposed by the Commission's gradual plan would produce turmoil, confusion, and perhaps bloodshed in the City of Memphis (R. 49a, 55a, 62a, 101a-103a), although there had not been any violence in the past due to the integration of facilities nor had any "agitators" appeared (R. 64a, 95a-96a, 103a). The belief that immediate integration of all facilities would lead to violence was based only on anonymous letters and phone calls that were received when facilities had been integrated in the past (R. 62a). They further testified that Memphis having been "singularly blessed by the absence of turmoil up to this time," the Park Commission, "consistent with good relations," desired to make all City-wide facilities available to Negroes "with all deliberate speed" (R. 50a).

There was evidence relating to an art gallery and museum known as the "Pink Palace" in support of defendants' assertion that certain lands upon which public recreational facilities had been built had been acquired pursuant to deeds containing racially restrictive covenants; it was urged, therefore, that complete integration should await construction of this deed by the Tennessee courts (R. 39a-43a).[4]

On June 20, 1961 the District Court, the Honorable Marion Boyd, entered judgment denying petitioners' application for permanent injunction as prayed in the complaint, approving the Park Commission's gradual plan (R. 118a-119a), requiring defendants to submit a further plan with respect to integration of playgrounds and community

[4] However, the Pink Palace Museum has been opened for Negro use one day per week (R. 59a) without objection from the corporate grantor or its successors (R. 58a-60a).

centers within a period of six months,[5] and staying decision with reference to the Pink Palace Museum until the Chancery Court of Shelby County, Tennessee had opportunity to determine the effect of integration of the races upon the title of the City of Memphis to this property (R. 118a-121a). The Court in its Findings of Fact and Conclusions of Law (R. 105a-117a) found that because of the local conditions in Memphis, additional time was needed to accomplish full desegregation of the public recreational facilities and that the gradual plan was in the public interest and was "consistent with good faith implementation of the governing constitutional principles as announced in *Brown* v. *Board of Education* [349 U. S. 294 (1955)]" (R. 117a).

Petitioners on July 7, 1961 appealed to the United States Court of Appeals for the Sixth Circuit. On June 12, 1962 that Court affirmed the judgment of the District Court on the Findings of Fact and Conclusions of Law of the District Judge. The Court of Appeals stated that the sole issue tendered by petitioners on their appeal was whether the allowance of any delay in total desegregation of all Memphis recreational facilities deprived them of their constitutional rights, i.e., whether the decision in the second *Brown* case applied to public recreational facilities as well as to public schools. In deciding this issue, the Court said:

> We are of the view that the principle stated in *Brown* v. *Board of Education, supra,* relating to the desegregation of schools, is applicable to the present case, involving the desegregation of recreational facilities of the City of Memphis. In our opinion the *Brown* decision is not limited to cases involving public schools, as is here contended by appellants. *Detroit Housing Com-*

[5] Under the provisions of this plan which was submitted on oral argument in the Court of Appeals at that Court's request, complete integration of all facilities would not occur until 1971. The plan, however, was not made part of the record.

mission v. *Lewis*, 226 F. 2d 180, 194, 185 (CA 6); see also *Cummings* v. *City of Charleston*, 288 F. 2d 817 (CA 4) (App. p. 22).

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With Prior Decisions of This Court Declaring Constitutional Rights to Be Personal and Present; the Delay Contemplated by the *School Segregation Cases* Is Not Applicable Here.

Previous decisions of this Court have stressed the present nature of constitutional rights. In *Sweatt* v. *Painter*, 339 U. S. 629, 635, this Court said, "[i]t is fundamental that these cases concern rights which are *personal and present*" (emphasis added). In *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637, a case involving the admission of a Negro to a state-supported institution of higher education, this Court declared: "[w]e concluded that the conditions under which this appellant is required to receive his education deprives him of his *personal* and *present* right to the equal protection of the laws," at p. 642 (emphasis added). See, also, *Sipuel* v. *Board of Regents of University of Oklahoma*, 332 U. S. 631, 632-33:

> The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it *as soon as it does for applicants of any other group. Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 83 L. ed. 208, 59 S. Ct. 232 (1938) emphasis added).

Notwithstanding this undeviating line of authority, the Court below in reliance on *Brown* v. *Board of Education*, 349 U. S. 294, sanctioned delay here. But shortly following the second *Brown* decision this Court made clear that it did not apply outside the area of elementary and high school education. *Florida ex rel. Hawkins* v. *Board of Control*, 350 U. S. 413 (1956). By extending *Brown* beyond the area indicated as permissible by this Court, the Court of Appeals ignored the reasons for that ruling.

Because of the complexity of the issues involved, the need to completely overhaul the public educational systems of numerous states, and because attendance at such public schools was compulsory and involved very large numbers of people, it was deemed a proper exercise of equitable jurisdiction to allow for some delay in the implementation of the rights that had been declared. Hence, the *Brown* decision was determined by the special problems with which it dealt. The Court made it quite clear that it was concerned with the "solution of varied local *school* problems" which would arise because of its decision. 349 U. S. 299 (emphasis added). Declaring that, "[a]t stake is the *personal* interest of the plaintiffs in admission to public schools *as soon as practicable* on a nondiscriminatory basis," 349 U. S. 300 (emphasis added), the Court pointed out with extreme care that delay was attributable to problems relating to school administration. Even as to this, the Court recognized only five such problems.[6]

Florida ex rel. Hawkins v. *Board of Control, supra,* underscored the limited reach of the second *Brown* opinion. This

[6] 1) The physical condition of the school plant; 2) the school transportation system; 3) personnel; 4) revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis; 5) revision of local laws and regulations where necessary. 349 U. S. 300-301.

Court's remand of a suit by a Negro seeking admission to graduate school for reconsideration in light of *Brown* v. *Board of Education*, 347 U. S. 483 (1954) "did not imply that decrees involving graduate study present the problems of public elementary and secondary schools." "Thus," the Court continued, "our second decision in the Brown case . . . had no application to a case involving a Negro applying for admission to a state law school." 350 U. S. 413. The problems involved in the desegregation of public recreational facilities, even further removed from lower school education and obviously less complex, do not compel a different conclusion.

Moreover, the cases cited below in support of the judgment do not justify making an exception to the settled rule of this Court. *Detroit Housing Commission* v. *Lewis*, 226 F. 2d 180 (1955), another Sixth Circuit case, upheld a District Court order to integrate forthwith public housing units, but held that the order contemplated only a gradual not immediate change in occupancy. Yet, the order of the District Court did require defendants to cease *immediately* the use of separate waiting lists for housing applicants. Obviously, as a practical matter, nonsegregated *occupancy* could not be accomplished immediately. And in *Cummings* v. *City of Charleston*, 288 F. 2d 817 (4th Cir. 1961), the only delay approved was that agreed upon by the parties. Any further delay was struck down.

Moreover, the justification proposed in support of delay here was avoidance of racial conflict (R. 49a, 55a, 62a, 101a-103a). But wherever this claim has been urged, this Court has rejected it. *Buchanan* v. *Warley*, 245 U. S. 60, 81 (1917); *Cooper* v. *Aaron*, 358 U. S. 1, 16.

The court below decided the case contrary to the holdings of this Court in another respect in affirming that part of the District Court's judgment which stayed adjudication

with respect to the Pink Palace Museum and allowed defendants to have determined in the courts of Tennessee the effect of integration on the City's title to the property. A finding by the Tennessee courts that racial integration would cause reversion to the grantor would not relieve the District Court of its duty under the Fourteenth Amendment since the City of Memphis cannot give scope to a racially restrictive grant in its operation of the museum. See *Pennsylvania* v. *Board of City Trusts of Philadelphia*, 353 U. S. 230 (1957).

CONCLUSION

WHEREFORE, for the foregoing reasons petitioners respectfully request that the petition for certiorari be granted.

Respectfully submitted,

JACK GREENBERG
CONSTANCE BAKER MOTLEY
DERRICK BELL
NORMAN AMAKER
10 Columbus Circle
New York 19, New York

A. W. WILLIS, JR.
588 Vance Avenue
Memphis, Tennessee

Attorneys for Petitioners

B. L. HOOKS
C. O. HORTON
B. F. JONES
H. T. LOCKARD
R. B. SUGARMON, JR.
Memphis, Tennessee
Of Counsel

APPENDIX

Opinion of United States Court of Appeals For the Sixth Circuit

No. 14662

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

I. A. WATSON, JR., *et al.*,

Plaintiffs-Appellants,

—v.—

CITY OF MEMPHIS, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

Decided June 12, 1962.

Before:

McALLISTER and O'SULLIVAN, *Circuit Judges,* and STARR, *Senior District Judge.*

McALLISTER, *Circuit Judge.* This is an appeal from a judgment of the district court denying a permanent injunction restraining the Memphis Park Commission and others from operating and maintaining certain public recreational facilities on a racially-segregated basis; approving a plan proposed by appellees for a gradual desegregation of cer-

tain of these facilities; and ordering the Memphis Park Commission to file, within a six-months' period, a further plan for the desegregation of all recreational facilities of the City.

In the complaint filed in this class action on behalf of appellees and others, it was alleged that the City of Memphis had denied certain of the appellants access to the Pine Hill Golf Course, the McKellar Lake Boat Dock, the Brooks Art Gallery, the John Rogers Tennis Court, and the Pink Palace Museum, solely because of the fact that they were Negroes. Prior to the hearing of this case in the district court, the City of Memphis had already desegregated the McKellar Lake Boat Dock and the Brooks Art Gallery; and the Pine Hill Golf Course had been desegregated prior to the time of the argument of this appeal. At the time of the hearing in the district court, the City of Memphis was undecided whether it would sell the John Rogers Tennis Court, because it was such valuable property. However, it has since been desegregated. As to the Pink Palace Museum, it was given to the City on the condition that it should be used only by white people, with a provision of reverter in the deed, in case of violation of this condition; and the district court ordered the City, within ninety days, to file suit in the courts of Tennessee for a declaratory judgment in order to secure a full adjudication of all matters that might affect the use, and reversion, and to determine what effect integration of the races at the Museum would have upon the title of the City of Memphis to the property.

It may be generally said, then, that the complaint of appellants as to the refusal of the City to permit them to use the parks specified in their allegation on the ground of racial discrimination has been remedied by the City through its action in desegregating the recreational facilities in question. However, appellants rest their claim on the other allegation of their complaint to the effect that

the City of Memphis is violating their constitutional rights in maintaining and operating all of its other parks, playgrounds, and recreational facilities upon a racially-segregated basis. It was in regard to these facilities that the district court issued an order requiring the City to submit, within a six-months' period, a plan for the total desegregation of all of its recreational facilities.

Appellants' contention is that the law permits of no delays on the part of the City of Memphis in effecting the desegregation of all its parks and recreational facilities, and that the district court was in error in not ordering all of the parks and recreational facilities of the City of Memphis to be immediately desegregated. Specifically, appellants claim that the district court committed reversible error "in holding that the decision in *Brown* v. *Board of Education*, 349 U. S. 294, which contemplates allowing a delay in the desegregation of public elementary and secondary schools, where certain conditions exist, is applicable in any action involving public recreational facilities." As contended by appellants, "logic as well as law requires limiting approval of delay to litigation involving public elementary and secondary schools, for attendance in such schools is compulsory almost everywhere whereas no one is compelled to utilize public recreational facilities."

The background of the case is as follows: The City of Memphis has a population of approximately 500,000 people, of whom 63% are white, and 37% are Negro. Approximately 100,000 children participate in one or more of the recreational activities sponsored by the Memphis Park Commission and carried on through its Recreational Department. This is a remarkable civic achievement on the part of the City of Memphis and its citizens. Of the 100,000 children participating, approximately 65,000 are white, and 35,000 are Negro. The Department sponsors many and varied types of recreational activities, including,

but not limited to, competitive sports, such as baseball and basketball, as well as dancing and similar activities. The Recreational Department headquarters is itself operated on an integrated basis. All Negro Supervisors and Directors are paid on the same salary schedule as the white Supervisors and Directors; and the qualifications of white and Negro Supervisors and Directors are the same. The Recreational Department of the Memphis Park Commission is rated by competent authorities as the best in the South; and its recreational program for Negroes as the finest in the country.

Upon the trial, it appeared that the City of Memphis, through its Park Commission, operates and maintains 131 parks and facilities, of which 108 are developed, and 23 are undeveloped, or "raw" land, that 25 of the developed facilities are restricted to Negroes; 25 are open to both races; and 58 are restricted to white persons; that the facilities operated on a racially-segregated basis include 40 neighborhood playgrounds for white persons, and 21 for Negroes; 8 white, and 4 Negro community centers; 5 white, and 5 Negro swimming pools; 5 white, and 2 Negro golf courses; and 2 "city-wide" white stadiums. It appears that, over the years of the past, it has been the policy of the Park Commission to designate parks and playgrounds as white or Negro, according to the racial character of the neighborhood. Pursuant to this policy, at the time of the trial, the district court found that 6 facilities would be changed from white to Negro use in the near future and that, as a result, the ratio for community centers would be changed from 8 white and 4 Negro centers to, 1 integrated, 7 white, and 4 Negro centers; and for swimming pools, the ratio would be changed from 5 white, and 5 Negro swimming pools, to 4 white, and 6 Negro swimming pools. It appeared on the trial that the Park Commission had recently removed all racial restrictions at 3 "city-wide"

facilities, namely: Overton Park Zoo, the Art Gallery in Overton Park, and the McKellar Lake Boat Dock. In June, 1961, the Park Commission's plan, which was approved by the court in the instant case, proposed to desegregate Fairgrounds Amusement Park at the end of 1961. This park, at the time of the hearing of this appeal, had already been desegregated. The Park Commission's plan also proposed, beginning in January 1962, to desegregate all 7 public golf courses on a three-year schedule. Four golf courses had already been desegregated at the time of the hearing of this appeal.

From the testimony of the Director of Parks of the City of Memphis, it appeared that, as each park and facility was desegregated, more recreational directors and supervisors were necessary and were appointed, and more policemen were required to patrol the parks and playgrounds. As an instance, the opening of the zoo on a desegregated basis made it necessary to increase the police protection there. The Director of Parks further testified that if there were immediate desegregation of all parks and playgrounds, the City would be obliged to reduce the number of available playgrounds in order to give the children full protection, and that such action would result in a denial of recreational facilities to a great number of children, both white and Negro. The Director also testified that one of the chief purposes of the recreational program was to cut down on juvenile delinquency of all children; and that one of the objectives, in this regard, was to keep as many children as possible "off the streets," during the summer vacation period. This objective would obviously be frustrated if numerous playgrounds were closed.

The Superintendent of the Recreational Department of the Memphis Park Commission, with thirty six years of experience in the field of public recreation, testified that if there were immediate and total integration of parks and

playgrounds of Memphis, "many, many of the playgrounds would have to be closed down"; more supervisors would be needed; there would be much additional violence and confusion; and, in his opinion, the playground system would be ruined. He had previously studied the matter of desegregation of golf courses in a number of southern cities, including Atlanta, Nashville, Dallas, and New Orleans, where he had learned that there had been some trouble during the integration progress but no bloodshed or violence. However, he did state that with regard to the playgrounds in Memphis, they had been obliged, on occasion, to call the police because of rowdies and trouble-makers, at the Negro parks, as well as at the white parks.

In explaining what he meant by "confusion," the Superintendent alluded to an experience which they had in Memphis where, because of the large numbers congregating for certain events, at "one of the closing exercises for Negroes at Lincoln Park, we had bloodshed, and shootings, and knifings, and it became necessary to break that down into separate closing exercises because of the trouble we had." This was an instance of what the Superintendent called "confusion" resulting from exercises participated in by great numbers of people at parks and playgrounds; and this "confusion" had nothing to do with desegregation, since all of those taking part in the exercises were Negroes. The difficulty obviously arose from a congregation of toughs, juvenile delinquents, and criminal elements, who, out of all proportion to their numbers, can cause trouble, violence, fighting, and bloodshed, among a great crowd of innocent people.

James C. Medonald, Chief of Police of the City of Memphis, who had been with the Police Department twenty-one years, stated that he had given several years of thought and consideration, since the decision in the *Brown* case, to the problems of desegregation in Memphis, from the stand-

point on the preservation of law and order; that when trouble resulted from "sit ins" and desegregated seating in busses, the Police Department, as soon as it received a call, would send three or four police cars "to get there as quickly as possible to keep down any violence." He further stated that he had been consulted by the Park Commission, that he thought its plan was good, and that since the *Brown* case was decided in 1954, a number of facilities in Memphis had been opened on a non-segregated basis, including libraries, the zoo, and other facilities. In the opinion of the Chief, the key to the solution of the problem was the timing—"where it would be on a gradual basis where the hot heads wouldn't have a chance to act. . . . We will have a little idea of what is coming off and can lay our groundwork for it and hope to be able to handle the situation."

Chief Macdonald put it succinctly: "You have a few in any bunch that will agitate trouble. I have seen it a lot of times that a few will cause a lot of people to get in trouble." He stated that he thought they had been very fortunate with so-called agitators in Memphis as compared to other communities, and that they did not have the agitation in Memphis that there had been in other places. In his opinion, the police could not handle the situation if all the park facilities were integrated at one time.

Mr. Harry Pierotti, Chairman of the Memphis Park Commission, stated that the City of Memphis had been singularly blessed by the absence of turmoil on the race question up to the date of the hearing of this case, and that he felt it was one of the Park Commission's duties to all the people of Memphis, white and Negro, to keep it that way. He stated: "I am going to abide by the rules of this court or get off the Park Commission, because I want no instance here like they have had in other parts of the South. And I believe that we can live better as a people

if you permit us to desegregate these things on a gradual basis. . . . Not only have I, but the other members of the Commission have, given this a long, hard look, and a lot of serious thought. This plan which we are evolving, and which we are asking the court to approve, is not one which was gotten up overnight. It was the result of a good many conferences with the members of my Commission and with other people. . . . Among other people, we have conferred with the law-enforcing officials and have gotten their opinion in the matter." He further stated that, upon integrating any facility, it, of course, involves additional personnel to make the transition period a smooth one, and that the consideration of avoiding confusion and turmoil in the community was a very strong factor in their determination as to when and what facilities should be integrated. In addition to the avoidance of confusion and violence, the city officials also took into consideration the effect of immediate or gradual desegregation upon the question of revenue from concessions operated by others for the Commission, and by the Commission itself.

The concessions, for certain amusement devices, operated by individuals, are granted by the Commission for rentals based upon gross receipts. The Commission felt that if it were to desegregate the Fairgrounds Amusement Park in the middle of the year, it would be unfair to such concessionaires and detrimental to the Commission. This amusement park was, however, to be desegregated six months after the hearing in the district court, or on January 1, 1962, and it has been desegregated since that date. The income from concessions, or similar operations, aggregated three quarters of a million dollars a year, or a third of the budget, and the Park Commission is obliged to earn this amount in order to operate the various facilities. If a large number of the facilities were closed down, the operating income would be seriously curtailed. Mr. Pierotti

stated that one of the reasons for his favoring the plan of a more gradual desegregation, rather than immediate integration of all the parks and recreational facilities, was that he stated to be the rather peculiar situation and location of Memphis,—a city of a half a million people, with more than one-third of its population consisting of Negro citizens; with the State of Arkansas just across the river from Memphis; and the State of Mississippi, five miles south of the city limits of Memphis; where such surrounding area was predominantly Negro; and where those people from this surrounding area made use of the recreational facilities. He felt that since the taxes used to maintain these parks and recreational facilities were paid by the citizens of Memphis, the predominance of a colored population, composed not only of Negro citizens in Memphis, but including many in the adjoining areas of Mississippi and Arkansas, who used the parks, would "promote" violence on the part of both Negroes and whites, in case of immediate desegregation of all of the parks, playgrounds and recreational facilities of the City of Memphis; and he based his opinion on his consultations with the park officials, the police officers, and his knowledge of the City and its people.

None of the evidence introduced on behalf of the City of Memphis is questioned. Whether the system of organized play in which these thousands of children take part, may be greatly curtailed or put in jeopardy by immediate desegregation of all the parks and playgrounds, is deemed irrelevant by appellants. The probable closing down of many of these facilities is considered equally irrelevant by appellants, as are any questions of orderly transition, police protection, maintenance of the present friendly and peaceful relations between all of the white and colored citizens of Memphis.

The evidence before us shows that what the City of Memphis proposes is not a mere promise to do something, sometime in a remote or uncertain future. On the trial it submitted a plan for the desegregation for a number of the parks and recreational facilities of the City, of which a substantial part had already been carried out after the plan was prepared, and before the hearing in the district court. It was further shown that the City had also desegregated a further substantial number of recreational facilities, subsequent to the hearing in the district court, and before the arguments in this court on the present appeal; and, from the statements made during arguments on appeal by counsel for the City as to the plan and intention of the City, which apparently were not doubted by counsel for appellants, it would appear that a substantial part of a specified program of desegregation has been carried out since the arguments on appeal. We therefore have before us a program of desegregation that has been carried out, is being carried out at the present time, and will be carried out in the future until all of the City's parks, playgrounds, and recreational facilities are desegregated.

The plan for the desegregation of all of the City's recreational facilities, which the district court ordered to be filed within a six-months' period after the hearing, is not, of course, in the record before us, nor has the district court had, as yet, the opportunity of approving it as a proper plan to effect the desegregation, with all deliberate speed, of all the parks, playgrounds, and recreational facilities of the City of Memphis. This plan, which, it appears, has been formulated, but which has not yet been filed with the district court, because of this intervening appeal, is not before us, therefore, for consideration.

The plan of the Memphis Park Commission, which was before the district court for integration of certain recrea-

tional facilities, provided for the desegregation of the Fairgrounds Amusement Park by the end of 1961; for the desegregation of three golf courses by March 1, 1962; for the desegregation of three more golf courses (one, used at present exclusively by Negroes) before March 1, 1963; and for the desegregation of the last of the seven municipal golf courses at the end of 1963. Moreover, in the plan, the Memphis Park Commission stated that it proposed to accelerate this program where judged practicable.

The foregoing was the plan which the district court approved; the court also directed that the City should file a further plan for the integration of all of the parks, playgrounds, and recreational facilities within a period of six months from the date of its judgment; and the court expressly retained jurisdiction of the case for such further proceedings as might be necessary from time to time.

Appellants made no specified objections to the plan which the district court approved. As the court stated in its opinion:

> "No valid objection to this plan in the Court's opinion is offered in this case. The plaintiffs merely say they want all of these facilities fully integrated now. Nothing else seems to matter."

This court is not in a position, at the present time, to adjudicate concerning the preliminary plan which the district court approved at the hearing. No objection has been made to any of its terms. The only complaint before us is that all of the parks, playgrounds, and recreational facilities of the City of Memphis were not immediately desegregated by order of the district court. As to the preliminary plan approved by the court, we know that four of the seven municipal golf courses are presently available to colored people, as well as the principal amusement park. There may be others. There may have been an acceleration

of the program; but appellants, as far as this case goes, are not interested in that question. Their claim is that no delay whatever is permissible; and that the allowance of any delay in the total desegregation of all Memphis recreational facilities deprives them of their constitutional rights.

As to the plan which the district court directed appellees to file, there is no objection to the approval of such plan, as it has not yet been filed, and the district court, necessarily, has been unable either to approve or disapprove such plan before the appeal was taken to this court.

We return, then, to the sole issue in the case raised by appellants: that the law permits of no delay on the part of the City of Memphis in effecting the desegregation of all of its parks and recreational facilities; that the district court was in error in not ordering all of the parks and recreational facilities to be immediately desegregated; and that the decision in *Brown* v. *Board of Education*, 349 U. S. 294, is inapplicable to a case involving public recreational facilities.

We are of the view that the principle stated in *Brown* v. *Board of Education*, *supra*, relating to the desegregation of schools, is applicable to the present case, involving the desegregation of recreational facilities of the City of Memphis. In our opinion the *Brown* decision is not limited to cases involving public schools, as is here contended by appellants. *Detroit Housing Commission* v. *Lewis*, 226 F. 2d 180, 184, 185 (CA 6); see also *Cummings* v. *City of Charleston*, 288 F. 2d 817 (CA 4).

In its findings of fact and conclusions of law, the district court said:

> "Full implementation of the constitutional principles as announced in the *Brown Case* requires solution of varied local problems. Local authorities, and in this case the responsible Park Commission officials, have

the primary responsibility of elucidating, assessing and solving these problems. The District Courts have the obligation of determining whether the action of local authorities constitutes good faith implementation of the governing constitutional principles; and in fashioning and effectuating decrees, the Court is guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."

"In determining whether defendants are acting in good faith in recognizing the constitutional rights of Negro citizens to make use of the Park Commission facilities on a nonsegregated basis, it is proper for the Court to consider (1) local conditions and local problems as to facilities, and teacher or supervisory personnel, as well as local problems of maintaining, during the transition period, maximum recreational facilities for all citizens, White and Negro; (2) importance of time to accomplish change-over from a partially segregated system to an integrated one; (3) good will and understanding heretofore obtaining between the races, and (4) avoidance of confusion and turmoil and maintenance of law and order in the community during the transition period."

"Defendants have shown by a preponderance of the evidence that addjtional time is necessary to accomplish full desegregation of all facilities operated by the Memphis Park Commission, and defendants have further shown that their plan and program for gradual desegregation is necessary, in the public interest, and is consistent with good faith implementation of the governing constitutional principles as announced in *Brown* v. *Board of Education, supra,* taking into account all of the local conditions and problems herein-

above set out; and the Court has concluded, in the exercise of its discretion, that the prayer for the declaratory judgment and injunctive relief should be denied."

Considering the great number of parks, playgrounds, and recreational facilities maintained by the City of Memphis; the remarkably large number of children—65,000 white children and 35,000 Negro children—participating in the program under the guidance of trained supervisors and directors of planned recreation; the circumstances showing a substantial desegregation of many of the City's recreational facilities, prior to the hearing in the district court, and a continuing program of desegregation since that time; the evidence that immediate desegregation of all of the City's parks, playgrounds, and recreational facilities would result in great damage to the organized system of play for many children, and the probable closing of a number of recreational facilities, due to the necessity of providing considerable additional police protection and park supervision; the past and present success of the continuing plan of desegregation now being peacefully and harmoniously carried out by the City; the unquestioned good faith of the officials of the City and Park Commission in attempting to comply, in the field of recreation, with the opinion of the Supreme Court in *Brown* v. *Board of Education*, both before the hearing of this case in the district court, and since that time; the requirement that the Park Commission file a plan for desegregation of the City's park and recreational system to be subject to the approval of the district court; the fact that this appeal was taken before the plan, ordered by the court, was filed, and that the district court has never had an opportunity to approve or disapprove such a plan—these considerations require a determination that, under the circumstances of this case, there

was a proper exercise of discretion by the district court in denying injunctive relief, in providing for a plan of desegregation to be filed by the Park Commission with the court, and in reserving jurisdiction for further proceedings in the case; and in accordance with the foregoing, the judgment of the district court is affirmed on the findings of fact and conclusions of law of Judge Boyd.